

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ROCKWELLS RESTAURANT CORP. : DECISION
DTA NO. 820747

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29

of the Tax Law for the Period December 1, 2004 :
through February 28, 2005.

Petitioner Rockwells Restaurant Corp., 97 Brookby Road, Scarsdale, New York 10583, filed an exception to the order of the Administrative Law Judge issued on January 26, 2006. Petitioner appeared by its president, Stephen Robins. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a letter brief in lieu of a formal brief in support. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to an administrative hearing with respect to a certain Notice and Demand for Payment of Tax Due issued by the Division of Taxation against it on July 8, 2005.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (“Division”) issued to petitioner, Rockwells Restaurant Corp., a Notice and Demand for Payment of Tax Due (Assessment ID Number L-025724079-4) seeking payment of sales and use tax due for the sales tax quarterly period ended February 28, 2005. This Notice and Demand is dated July 8, 2005 and states, as the reason for its issuance, that “[y]our check, for payment of the amount due on your return, was returned to us as unpaid.” Petitioner does not challenge the date of issuance of the Notice and, in fact, admits receipt thereof. Similarly, petitioner does not challenge the Division’s claim that the tax due per its return for the period at issue was not paid.¹

In response to the Notice and Demand, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). By a letter dated August 5, 2005, BCMS denied the request for a conference, advising petitioner as follows:

The Tax Law provides that a conciliation conference may be requested when the Department issues a notice which gives rise to formal protest rights. In most cases, it is the issuance of a Notice of Deficiency or Notice of Determination, or the denial of a refund which may be protested. In this case, the Notice and

¹ A Consolidated Statement of Tax Liabilities dated September 27, 2005 and issued to petitioner by the Division reveals that the amount assessed for the quarterly period in question consisted of tax in the amount of \$34,352.83, plus penalty and interest.

Demand which you received is not such a notice and your request cannot be accepted.

On October 4, 2005, petitioner challenged this denial by filing a petition with the Division of Tax Appeals seeking a hearing on the merits of the assessment.

On October 14, 2005, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. This Notice, as well as an accompanying letter, advised petitioner as follows:

Pursuant to § 173-a of the Tax Law, any notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency because of a mathematical or clerical error on a return or for failure to timely pay the tax due shown on a return shall not give that taxpayer a right to a hearing in the Division of Tax Appeals. The only option for such a taxpayer, is to pay the tax, apply for a refund and then petition for a hearing if the refund claim is denied.

Each of the parties to this matter was afforded a period of 30 days to submit written comments with regard to the proposed dismissal of the petition.

On October 24, 2005, the Division submitted a letter in agreement with the proposed dismissal as proper pursuant to Tax Law § 173-a.

On November 14, 2005, petitioner submitted a letter in opposition to dismissal which provided as follows:

The taxpayer's failure to timely pay the tax due shown on its return was a result of actions by representatives and employees of the Department of Taxation and Finance taken prior to December 1, 2004. Although the Notice and Demand under protest was issued on July 8, 2005 the actions and misconduct by representatives and employees of the Department of Taxation and Finance causing the taxpayer's failure to timely pay the tax due on its return was prior to the enactment amending the Tax Law Chapter 60 of the laws of 2004 therefore the taxpayer is entitled to a hearing.

Petitioner did not further specify the alleged "actions" and "misconduct," or how the same caused petitioner's failure to timely pay the tax due on its return.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that Tax Law § 2006(4) provides for:

[a] hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter* (emphasis added).

Tax Law § 173-a² amended the Tax Law to specifically provide that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, *inter alia*, a notice and demand issued after December 1, 2004 (without the issuance of a notice of deficiency or a notice of determination) as the result of a mathematical error on a return or for failure to timely pay the tax due as shown on a return.

The Notice and Demand in this matter, the Administrative Law Judge pointed out, was based on petitioner's undisputed nonpayment of the amount of tax shown due on its return and was issued to petitioner on July 8, 2005. As was noted earlier, Tax Law § 173-a applies to notices and demands for payment issued on or after December 1, 2004. Accordingly, the Administrative Law Judge found such provision precludes petitioner from obtaining a hearing with respect to the subject Notice and Demand which was issued after December 1, 2004. The Administrative Law Judge observed that petitioner's allegations that actions and misconduct by the Division of Taxation caused the nonpayment of tax are neither specific nor substantiated. More importantly, the Administrative Law Judge noted that there is no provision in Tax Law § 173-a or any other provision in the Tax Law, pursuant to which such allegations, even if substantiated, could override the specific legislative denial of the right to a hearing.

Accordingly, the Administrative Law Judge dismissed the petition.³

²Added by L 2004, ch 60, eff August 20, 2004, and applicable to notices and demands and notices of additional tax due issued on or after December 1, 2004.

³The Administrative Law Judge noted that petitioner may not be entirely without recourse in this matter. That is, petitioner may pay the disputed tax sought by the Division via the Notice and Demand and thereafter file a

claim for refund. Upon denial of such claim for refund, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.

ARGUMENTS ON EXCEPTION

On exception, petitioner states that it was not required to specify the actions or misconduct of the Division of Taxation. Further, petitioner claims that Tax Law § 173-a is inapplicable to the hardship of petitioner which was caused by the Division long before such section was enacted.

OPINION

We affirm the order of the Administrative Law Judge for the reasons stated therein. Petitioner has provided no legal basis upon which we could justify modifying the order of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rockwells Restaurant Corp. is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Rockwells Restaurant Corp. is dismissed.

DATED: Troy, New York
October 5, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner